No. 1825

IN THE

# UNITED STATES

# CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

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| CRAFT-MURRAY CO., *Plaintiff in Error,* vs. CHAS. O. BUENT & BRO., *Defendant in Error* | No. 1927 |

# BRIEF OF DEFENDANT IN ERROR

UPON WRIT OF ERROR TO THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HAROLD PRESTON and
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605 Lowman Building, Seattle, Wash.

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| CHAS. H. LILLY CO.,<br>*Plaintiff in Error,*<br>vs.<br>CHAS. S. BRENT & BRO.,<br>*Defendant in Error.* | No. 1825. |

# BRIEF OF DEFENDANT IN ERROR

UPON WRIT OF ERROR TO THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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We wish at the outset to call attention to one mistake contained in the brief of plaintiff in error. Upon page 5 of the brief the first sentence of the letter, dated Paris, Kentucky, June 27, 1908 (which is

plaintiff's Exhibit "E," set out at page 212 of the transcript of record), is quoted as follows:

"Yours of the 22nd confirming purchase of blue grass seed from us duly to hand and seems to be correct; 325 bags of fancy cleaned true blue grass seed, testing 21 pounds to the measured bushel at $1.40 per bushel (14#) f. o. b. cars here."

The correct reading of the letter is:

" * * * * * testing (21#) to the measured bushel," etc., etc. We consider it of some importance that the letter be read by the court as it was written so as to avoid any possible inference that plaintiff in error might not have understood (14#) as meaning 14 pounds.

As we wish to have before the court more of the correspondence than plaintiff in error has set out, we will begin at the beginning so that in reading our brief the court may have before it all of the correspondence which we deem material to a determination of this appeal. The correspondence is as follows:

PLAINTIFF'S EXHIBIT "A.")

"A."

"Paris, Ky., June 17, 1908.

"Messrs. Chas. H. Lilly & Co.,

"Seattle, Wash.

"Dear Sirs: We offer you, for wire acceptance and if unsold, 325 bags of Fancy Cleaned

TRUE KENTUCKY BLUE GRASS SEED

at $1.40 per bushel f. o. b. cars here, August, September or October shipment.

"Samples of the new crop will not be ready before the first of August, but we will guarantee to deliver only new crop and that it will test 21 pounds to the measured bushel.

"Hoping to be favored with your order, we are

"Yours truly,

"CHAS. S. BRENT & BRO."

(PLAINTIFF'S EXHIBIT "A½.")

"A½."

"Seattle, Wash., June 22.

"Chas. H. Brent & Bro.

"Book order one minimum car Kentucky Blue Grass, yours, seventeenth.

"THE CHAS. H. LILLY CO."

(PLAINTIFF'S EXHIBIT "B.")

"B."

"Seattle, Wash., June 22, 1908.

"Chas. S. Brent & Bro., Paris, Kentucky.

"Ship to The Chas. H. Lilly Co., Seattle, Wash.

"Please ship via.....

"Payment.....

"Ship when August, September, October, 1908, our option.

"Insurance.....

"No drayage allowed on this order.

"The following articles:

"One minimum car New Crop Cleaned True Kentucky Grass Seed weighting 21 pounds to the bushel at $1.40 per bushel, f. o. b. cars, Paris, Ky.

"Per your quotation, June 17.

"Confirming our wire to you this date as follows: 'Book order one minimum car Kentucky Blue Grass. Yours seventeenth.'

"Please acknowledge.

"THE CHAS H. LILLY CO.,

"Per FRANK LECKENBY."

(PLAINTIFF'S EXHIBIT "S.")

"S."

"The Chas. H. Lilly Co.,
"Seattle, Wash.

"Gentlemen: Your telegram of the 22nd accepting our offer of one carload Fancy Cleaned Kentucky Blue Grass Seed, testing 21#, at $1.40 per bushel f. o. b. cars here came to hand late and we wired you promptly this a. m. acknowledging the order. We now confirm the trade and await your advices. Trust that you will let us know which month you prefer shipment, as the early shipments generally tax our capacity and we do not want to delay your shipment if you wish it to go early.

"Thanking you for the order and awaiting your further advices, we are,

"Yours truly,
"CHAS. S. BRENT & BRO."

(PLAINTIFF'S EXHIBIT "C.")

"C."

"Seattle, Rug. 3, 1908.

"Chas. S. Brent & Bro.,
"Paris, Ky.

"Gentlemen: Referring to our requisition No. 7272, June 22nd, please ship the Kentucky Blue Grass at your earliest convenience.

"We are advised that minimum carload weight is 30,000 pounds, and through rate $1.35. Please route via L. & N., St. Louis; C., B. & Q. and N. P.

"Yours truly,
"THE CHAS H. LILLY CO.,
"Per V. H. NIVISON."

(PLAINTIFF'S EXHIBIT "D.")

"D."

"Chas. A. Brent & Co.,
"Paris, Kentucky.

"Gentlemen: We have your favor of the 25th and will advise you later just what shipment we want on Kentucky Blue Grass seed, but we will want it just about as soon as you can send us new crop. We don't want old crop seed. It must be 1908 harvest.

"Yours truly,

"THE CHAS. H. LILLY CO.,

"Per FRANK LECKENBY, Vice-president."

(PLAINTIFF'S EXHIBIT "E.")

"E."

"Paris, Ky., June 27, 1908.

"The Chas. H. Lilly Co.,
"Seattle, Wash.

"Gentlemen: Yours of the 22nd (yours No. 7272) confirming purchase of Blue Grass Seed from us duly to hand and seems to be correct.

"325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at $1.40 per bushel (14#) f. o. b. cars here.

"While the shipment is optional with you as to August, September or October, yet we would like for you to express your perference now so that there will be no delay in making the shipment when you want it. You understand that we are generally very much rushed during these months and would not like to sell to others up to capacity for August and then learn that you wanted your shipment that month.

"Yours very truly,

"CHAS. S. BRENT & BRO."

(PLAINTIFF'S EXHIBIT "F.")

"F."

"Seattle, 7|2|08.

"Chas. A. Brent & Bro.,
Paris, Kentucky.

"Gentlemen: Answering your favor of the 27th, we wish to correct your misunderstanding of our order. This called for minimum car of 15 tons and not for 325 bags.

"We would like to have shipment between August 15 and September 15 providing new crops is harvested by that time, but notify us and send sample before shipping so that we will be ready to take care of the seed.

"Yours truly,
"THE CHAS. H. LILLY CO.,
"Per FRANK LECKENBY, Vice-president."

(PLAINTIFF'S EXHIBIT "K.")

"K."

"Paris, Kentucky, August 22, 1908.
"CHAS. S. BRENT & BRO.

"The Chas. H. Lilly Co.,
"Seattle, Wash.

"Terms S|D with B|L.

"To 270 bags No. 21 Fancy Cl. Ky. Blue Grass Seed. 1908 crop, 2160 bus., $1.40 . . . . . 3024

"Car L. & N. 3364.

"Via L. & N., C., B. & Q. and N. P.

"PLEASE PROTECT DRAFT."

(PLAINTIFF'S EXHIBIT "L.")

"L."

"Seattle, 8|27|08.

"Chas. S. Brent & Bro.,
"Paris, Kentucky.

"Gentlemen: We have your invoice of August

22 and wired you today as follows: 'Cannot accept car. Invoice should be about $2,000.00 instead of $3,000.00.'

"At $1.40 per 21# would be less than $7.00 per 100 and 30,000# at $7.00 per 100 would be $2,100.00. We do not understand why you should have put more than this in the car as we specially provide in our requisition of June 22 that it was to be a minimum car weighing 21# to the bushel at $1.40 per bushel and later on in our letter of July 2 called your attention to the fact that it was to be a minimum car of 15 tons and no more.

"Yours truly,

"THE CHAS A. LILLY CO.,
"Per FRANK LECKENBY, Vice-president."

(PLAINTIFF'S EXHIBIT "M.")

"M."

"Paris, Ky., August 27, 1908.

"The Chas. H. Lilly Co.,
"Seattle, Wash.

"Gentlemen: Your telegram of this date as follows, 'Cannot accept car. Invoice should be about $2,000.00 instead of $3,000.00,' came as a surprise to us. You wrote us on August 3rd, 'We advised that minimum carload is 30,000 lbs.' This was also our information and we forwarded to you as minimum carload 270 bags (30,240#) It has been the general custom here in making up a 30,000# car to put in 270 bags (30,240#). Of course, if you object to the excess of 240#, you can either return it at our expense or take it at the present market price.

"We hardly think that this small excess can be the ground for refusing to accept the invoice. We have accordingly considered the order and correspondence following it for the purpose of ascertaining, if possible, the real cause of your refusal to

accept the invoice. You say in your telegram, "Invoice should be about $2,000.00 instead of $3,000.00." We see no possible explanation of this unless (as the figures would indicate) you claim that you were to pay $1.40 for 21# instead of 14#—14 being two-thirds of 21; you must mean that you were to pay $1.40 for 21# instead of 14#, as this would make about two-thirds of the invoice as suggested in your telegram. Assuming therefore that you mean that you should pay for the seed at the rate of $1.40 for 21#, we are wholly unable to conceive how you could make such a claim.

"If you will refer to our first offer (June 17, 1908) you will find it as follows:

" 'Paris, Ky., June 17, 1908.

" 'Dear Sirs: We offer you, for wire acceptance and if unsold, 325 bags of Fancy Cleaned True Kentucky Blue Grass Seed at $1.40 per bu., f. o. b. cars here. August, Sept. or October shipment.

" 'Samples of the new crop will not be ready before the first of August but we will guarantee to deliver only new crop and that it will test 21 pounds to the measured bushel.

"Hoping to be favored with your order, we are, etc.'

"You will note that we guaranteed that it would test 21# to the *measured* bushel. Everybody knows that the standard weight of Blue Grass Seed is 14# to the bushel and we do not doubt that your own records will remind you (if you do not know) that a bushel of Blue Grass Seed means 14#. In order to furnish a superior quality of seed we guaranteed that a *measured* bushel would weigh 21#. We at no time offered to sell you 21# for $1.40 but our offer was to sell you seed at $1.40 per bu. (the weight of a bu. being 14# and so known to all of the United States). But in order to convince you that the quality of this seed was unusually good, we guaranteed that a measured bushel would weigh 21#.

"Again in our letter of June 27, 1908, in which we acknowledge your letter of June 22, 1908, we used these words, 'test 21# to the measured bushel at $1.40 per bu. (14#) f. o. b. cars here,'' etc.' We know that you received this letter because in your letter of the second of July you acknowledged receipt of it and after thus thoroughly understanding the matter you give us shipping instructions.

"The contract in this case is shown wholly by the telegrams and correspondence. There were no talks which could have misled anyone. There is no room whatever to make such a claim as we are presuming you are making. We must therefore insist upon your accepting the seed and paying for it at $1.40 per 14# because we know that it comes up to our guarantee—that a measured bushel will weigh 21# and that it is of the 1908 crop. If you refuse to accept it, we will be compelled to sell it for what we can get and hold you for the difference. You understand that we are not well prepared to handle it in Seattle and that a considerable loss will probably result from your refusal to accept it; while on the other hand we have no doubt you could sell it at a profit.

"In view of what we have written and after reconsidering the matter please advise us whether you will accept or reject the seed in order that, if you reject it, we may promptly take steps to dispose of the seed at your expense if there is any loss.

"Hoping that you will accept the invoice and pay the draft which is en route, we remain,

"Yours very truly,

"CHAS. S. BRENT & BRO."

(PLAINTIFF'S EXHIBIT "N.")

"N."

"Seattle, Wash., Sept. 3, 1908.

"Chas. S. Brent & Bro.,

"Paris, Kentucky.

"Will accept seed per contract; only willing to pay $1.40 per bushel of 21 pounds. No more. See letter.

"THE CHAS. H. LILLY CO."

(PLAINTIFF'S EXHIBIT "O.")

"O."

"9|3|08.

"Chas. S. Brent & Bro.,

"Paris, Kentucky.

"Gentlemen: Your letter of the twenty-seventh of August received. There is no use to quibble about the matter at all. Your offer and our acceptance are entirely plain. There is no room for different construction—you offered the seed at $1.40 per bushel, guaranteeing to deliver only new crop, and "that it will test 21 lbs. to the measured bushel." Our acceptance by wire referred to this offer. On the same date we wrote, giving order for

"'One minimum car new crop fancy cleaned true Kentucky blue grass seed, weighing 21 pounds to the bushel at $1.40 per bushel, f. o. b. cars, Paris, Ky., per your quotation June 17," etc.'

"By this we are willing to be bound, and we are now ready and offer to pay for the grass seed upon the arrival of the car, according to this agreement, *but not one cent more.* In order to receive the car, we of course, will have to have the B|L, and this we cannot get without paying your draft which is for $3,024.00. This is more than we contracted to pay. If you will instruct Dexter Horton & Co., the bankers holding draft, to deliver us the B|L upon payment of the proper amount, we will take it up immediately.

"There is no use to waste time corresponding about this matter.

"Yours truly,

"THE CHAS. H. LILLY CO.,

"Per....."

(DEFENDANT'S EXHIBIT NO. 1.)

1.

"Paris, Ky., July 11, 1908.

"The Chas. H. Lilly Co.,

"Seattle, Wash.

"Gentlemen: We have to acknowledge receipt of your favor of the sixth, giving shipping directions on car of Blue Grass Seed, your requisition No. 7272 and shall have your best attention.

"Yours very truly,

"CHAS. S. BRENT & BRO."

(DEFENDANT'S EXHIBIT NO. 2.)

2.

"Paris, Ky., August 18, 1908.

"The Chas. H. Lilly Co.,

"Seattlee, Wash.

"Gentlemen: Yours of the thirteenth, crossing ours of the tenth and eleventh, with samples duly to hand and all noted. You doubtless have those samples ere this and we are today sending you six (6) mail samples of 21# Fancy Blue. This was taken from the seed that we are making for you. The car is just about half made and we will ship some time this week. This lot of samples will almost exactly represent the car as it will go forward to you and we feel no hesitancy in saying that a better one will not leave Kentucky this year.

"Yours very truly,

"CHAS. S. BRENT & BRO."

DEFENDANT'S EXHIBIT NO. 3.)

3.

"Seattle, Wash., Aug. 27, 1908.

"Chas. S. Brent & Bro.,

"Paris, Ky.

"Cannot accept car invoice. Should be abqut $2,000.00 instead of $3,000.00.

"THE CHAS. H. LILLY CO."

"Seattle, Wash., Sept. 4, 1908.

"Chas. S. Brent & Bro.,

"Paris, Ky.

"Will accept seed per contract; only willing to pay $1.40 per bushel of 21 pounds. No more. See letter.

"THE CHAS. H. LILLY CO."

Chas. H. Lilly, president of plaintiff in error, testified in effect that the carload of grass seed was unloaded and the seed went into plaintiff in error's warehouse somewhere from the twelfth to the sixteenth of September, 1908; and he also testified, in effect, that the letter from the defendant in error to plaintiff in error, dated August 27, 1908 (plaintiff's exhibit "M") was received early in September and before the carload of seed was received. (Transcript of Record, pages 116 and 117.)

## ARGUMENT.

The complaint in this action was so framed that defendant in error, upon the trial, could rely upon the contract of sale made up of the correspondence between the parties as a clear, explicit and unambiguous contract, or, should the trial court hold that the contract was ambiguous in respect of the number of pounds of seed to be furnished for $1.40, could rely upon a general custom of the trade, fixing the weight

of a trade bushel of Kentucky Blue Grass Seed at 14 pounds. Plaintiff in error seemed content with this situation, and upon the trial not only was the correspondence between the parties introduced and received in evidence, but a large amount of evidence was introduced on both sides regarding the custom of the trade; and the trial court was not called upon to place a construction upon the correspondence between the parties until after the evidence was all in and defendant in error moved for a directed verdict upon the ground that the contract between the parties was clear, explicit, and unambiguous, and that under its terms the plaintiff in error had obligated itself to pay $1.40 for each 14 pounds of seed delivered. The court held with defendant in error and directed a verdict and gave judgment in his favor. Thereafter plaintiff in error petitioned for a new trial which petition was denied. The analysis made by the learned district judge, before whom the case was tried, of the correspondence between the parties is so much clearer and more convincing than we could hope to offer the court that we shall set out here as a part of our argument such portions of it as deal directly with the construction of the correspondence. The opinion in full may be found at pages 227 to 237 of the Transcript of the Record.

"This action is brought to recover the purchase price of a carload of Kentucky blue grass seed sold by plaintiff to defendant. There is no dispute as to the quantity or quality of the seed. The controversy turns on the construction of the contract of sale and the only substantial question between the parties is, how many pounds constitute a bushel within the meaning of the contract which fixed the price at $1.40 per bushel. It is admitted that the seed delivered weighed 30,240 pounds. Plaintiff, computing a bushel as fourteen pounds, sues for the price of 2,160 bushels, amounting to $3,024.00, while defendant, computing a bushel at twenty-one pounds, contends that it is liable for only 1,440 bushels amounting to $2,016. It does not appear that the seed was ever measured and therefore the number of actually measured bushels contained in the shipment is unknown. Neither party claims that the number of bushels was to be determined, under the contract, by a measurement in fact.

"At the close of all the evidence, the Court peremptorily instructed the jury to find for the plaintiff for the full amount claimed. On this petition defendant assigns as grounds for a new trial, (1) the instruction to find for plaintiff and (2) the court's ruling excluding testimony offered by defendant to show the market price of that kind of seed at the time the contract was made. The first point involves a consideration of the entire case. The parties never had any oral negotiations and the contract was entirely by correspondence. This began with the following communication, (plaintiff's Ex. A):

"Paris, Ky., *June 17, 1908.*

"*Messrs. Chas. H. Lilly & Co.,*

"*Seattle, Wash.*

Dear Sirs: We offer you, for wire acceptance and if unsold *325* bags of Fancy Cleaned TRUE KENTUCKY BLUE GRASS SEED at *$1.40* per bu., f.o.b. cars here. *August, Sept. or October* shipment. Samples of the new crop will not be ready

before the first of August, but we will guarantee to deliver only new crop and that it will test *21* pounds to the measured bushel.

"Hoping to be favored with your order, we are

"Yours truly,

"CHAS. S. BRENT & BRO."

The foregoing exhibit consists of a printed form with blanks filled by typewriting. The typewritten words are shown in italics, the remainder, including the signature, being printed. To this defendant answered by telegram (plaintiff's Ex. A½) as follows:

"Seattle, Wn., June 22nd,

"Chas. S. Brent & Bro.,

Book order one minimum car Kentucky Blue Grass yours seventeenth.

"THE CHAS. H. LILLY."

This telegram was acknowledged by plaintiff the next day by the following letter, (plaintiff's Ex. S.):

"Paris, Ky., June 23, 1908.

"The Chas. H. Lilly Co.,

"Seattle, Wash.

Gentlemen: Your telegram of the 22nd accepting our offer of one car load Fancy Cleaned Ky. Blue Grass Seed, testing 21#, at $1.40 per bu. f. o. b. cars here, came to hand late and we wired you promptly this a. m. acknowledging the order. We now confirm the trade and await your advices. Trust that you will let us know which month you prefer shipment, as the early shipments generally tax our capacity, and we do not want to delay your shipment if you wish it to go early.

"Thanking you for the order and awaiting your further advices, we are

"Yours very truly,

"CHAS. S. BRENT & BRO."

On sending its telegram of June 22, defendant immediately confirmed it by mailing to plaintiff one of its printed forms of purchase contract, (plaintiff's Ex. B.) on which were typewritten after the words "ship when" the words "Aug.—Sept.—Oct.—1908. Our option," and below in the body of the page appears the following:

"One minimum car New Crop Fancy Cleaned True Kentucky Blue Grass Seed weighing 21 lbs. to the bushel, $1.40 per bushel f.o.b. cars Paris, Ky. Per your quotation June 17th. Confirming our wire to you this date as follows: 'Book order one minimum car Kentucky Blue Grass yours seventeenth.' Please acknowledge."

This is signed by defendant per Mr. Leckenby, the manager of its seed department. On receipt of this plaintiff wrote to defendant as follows (plaintiff's Ex. E.):

"Paris, Ky., June 27, 1908.

"The Chas. H. Lilly Co.,

"Seattle, Wash.

"Gentlemen: Yours of the 22nd (Your No. 7272) confirming purchase of Blue Grass Seed from us duly to hand and seems to be correct.

"325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at $1.40 per bu. (14#) f.o.b. cars here.

"While the shipment is optional with you as to Aug., Sept., or October, yet we would like for you to express your preference now so that there will be no delay in making the shipment when you want it. You understand that we are generally very much rushed during these months and would not like to sell

to others up to capacity for August and then learn that you wanted your car shipped that month.

"Awaiting your further favors,

"Yours very truly,

"CHAS. S. BRENT & BRO."

Five days later defendant answered the foregoing letter as follows, (plaintiff's Ex. F.):

"Seattle, 7-2-08.

"Chas. S. Brent & Bro.,

"Paris, Kentucky.

"Gentlemen. Answering your favor of the 27th, we wish to correct your understanding of our order. This called for minimum car of 15 tons and not for 325 bags.

"We would like to have shipment between August 15th and September 15th, providing new crop is harvested by that time, but notify us and send sample before shipping so that we will be ready to take care of the seed.

"Yours truly,

"THE CHAS. H. LILLY CO.

"By Frank Leckenby, Vice-Pres."

* * * * * * * *

I feel satisfied, however, that in reason and justice, as well as law, the correspondence precludes the defendant from disputing the claim of the plaintiff that fourteen pounds of seed constituted a bushel according to the terms of the contract. The evidence is entirely uncontradicted that the custom claimed by the plaintiff prevailed in the state of Kentucky and throughout all the neighboring parts of the country. There can be no question but that the plaintiff at all times understood the contract to call for fourteen pounds to the bushel. The contrary is not seriously contended by defendant. Now, in his letter of June 27 to the defendant (plaintiff's

Ex. E.) plaintiff expressly defined a bushel as being fourteen pounds; and while defendant acknowledged the receipt of this on July 2, (Ex. F.) and corrected plaintiff's understanding of the contract in other respects, it made no objection to, or criticism of this feature of plaintiff's letter. Conceding that defendant was not bound by any notice of the custom defining a bushel as fourteen pounds in first placing its order, it was fully informed of plaintiff's understanding to that effect when it received plaintiff's letter of June 27. Taking defendant's contention at its best, and assuming that when sending its first telegram it expected twenty-one pounds to the bushel (which is not at all clear when plaintiff's offer of June 17 is read in the light of all the evidence) the most that would follow would be that there was no meeting of minds and therefore no contract as a result of the first exchange of communications. But defendant having received the letter of June 27, allowed plaintiff to rest under the belief that it acquiesced in the construction of the contract fixing a bushel at fourteen pounds until after the seed had been delivered on the railroad car and had started on its westward journey. Further, the evidence shows that defendant was the largest seed dealer in the northwest and perhaps the largest on the Pacific Coast. It had for a number of years issued an annual seed catalogue and in listing Kentucky blue grass seed, its catalogue had invariably referred to a bushel as fourteen pounds. It is very likely true, as claimed by defendant, that this was merely intended to inform farmers and others sowing seed that fourteen pounds by weight should be sown where the directions called for the sowing of a bushel. It is to be noted, however, that regardless of the quality of the seed (it being undisputed that the better the quality the greater the weight of a bushel) fourteen pounds is invariably designated as a bushel in defendant's catalogues. The evidence makes it clear that persons desiring to buy blue grass seed intelli-

gently must be informed of the weight per bushel for the purpose of testing the quality of the seed, whether it is to be sold by the pound or by the bushel. It is apparent that since the increased weight per bushel is brought about by cleaning the seed from chaff and similar waste, a greater weight shows a better quality and therefore the weight per bushel is an important fact regardless of the method of computing quantity. An experienced seed dealer knowing these facts could not have been misled as to the meaning of the letter of June 27.

Construing the entire correspondence in the light of the undisputed evidence, I have no hesitation in concluding that the defendant is bound, especially in view of the letter of June 27, to treat fourteen pounds as a bushel. * * * * There are several principles of law which, when applied to the facts of this case, require that plaintiff should have judgment for his claim. (1) Where there is doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties. (2) Where the parties to a contract of doubtful meaning have themselves given it a definite construction, this in the absence of illegality or other controlling circumstance, will be adopted by the courts. (3) A party who has induced another to act on a certain understanding cannot, after the other party has acted, deny that understanding to the other's loss.

In the federal courts before submitting a case to the jury, there is always a question for the court as to the sufficiency of the evidence to justify a verdict. In whatever aspect I view this case I feel that a verdict in accordance with defendant's contention should be set aside as contrary to the law and right of the case. I therefore hold that there was no error in instructing the jury to find a verdict for the plaintiff.

On the second error assigned defendant urges

that it should have been permitted to show the market price of seed of this character at the time the contract was made, for the purpose of raising the inference that defendant would not have made the contract with plaintiff for a bushel of fourteen pounds at the price named. No reference to the market price was made in the pleadings and plaintiff could not be expected to be prepared to meet evidence on that point even if it could be considered admissible under any circumstances. It is sufficient to say that even if defendant had been allowed to introduce such evidence, it would not have affected the reasoning hereinbefore stated which require a judgment for plaintiff.

On the argument on this petition reference is made to the remarks of the court at the trial, touching the admissibility of evidence concerning the intention of the parties. I do not think the remarks can be misunderstood. Where a contract is entirely in writing, as in this case, the intention of the parties must be gathered from the writings and from the surrounding circumstances. It is not competent for a party to testify as to what intention existed in his mind when he has not communicated that state of mind to the other party. What was said by the court on that subject merely expressed this idea.

For the reasons stated the petition for a new trial is denied.

GEORGE DONWORTH,
Judge."

While we consider the reasoning of the learned district judge unanswerable, and the grounds stated by him for granting the motion for a directed verdict, ample, we think the testimony discloses other support for the ruling. After the receipt by plaintiff in error of the letter of June 27, 1908 (plaintiff's exhibit "E") which plainly stated that $1.40 was to

be paid for each fourteen pounds of the seed, nothing passed between the parties touching the question of weight until the telegram and letter from plaintiff in error of August 27, 1908, both of which appear in plaintiff's Exhibit "L". Immediately upon receipt of the telegram defendant in error wrote and mailed to plaintiff in error the letter marked plaintiff's exhibit "M" which letter was received by plaintiff in error about September 3rd, long before the arrival of the carload of seed. In this letter plaintiff in error is informed in the most explicit terms of the construction placed by defendant in error on the previous correspondence and of the intention of the defendant in error to demand payment at the rate of $1.40 for each fourteen pounds of the seed. After the receipt of that letter and on September 3rd, 1908, plaintiff in error wrote and mailed defendant in error the letter ,plaintiff's Exhibit "C", denying the correctness of the construction placed upon the previous correspondence by the defendant in error and stating that it would not accept the seed unless defendant in error would agree to accept payment at the rate of $1.40 for each twenty-one pounds of the seed. This ended the correspondence between the parties. The issue was clearly joined and it was for the parties to stand upon their legal rights. With an absolutely clear

cut issue between them and no possible misunderstanding of the facts, neither party had the right to do anything for his or its own benefit which would place the other in a worse position. But it appears from the testimony that even before this last correspondence plaintiff in error had made sales of blue grass seed in anticipation of the arrival of this particular carload, and it was evidently liable to heavy losses if it failed to keep its contracts, not only in loss of immediate profits, but of future business. Reference to its catalogues for 1908 will show that at the prices charged by it for grass seed in hundred pound lots, it would make a handsome profit on seed purchased for $1.40 per fourteen pounds. Finding that defendant intended to stand upon the contract as he understood it, plaintiff in error for its own protection accepted the seed and converted it to its own use. The testimony regarding the acceptance and conversion of the seed is found in the transcript of the record as follows: Frank Leckenby, Manager of plaintiff in error, page 190; Harry Leckenby, page 195; Chas. H. Lilly, president of plaintiff in error, pages 116 and 117. A feeble attempt was made to show that the car was received and unloaded through some error or mistake on the part of plaintiff in error's employe, Harry M. Leckenby, but both he and his brother, the manager, testified, in effect,

that sales had been made in anticipation of the arrival of the car, and that its arirval was anxiously awaited, and that it was eagerly accepted, unloaded and re-shipped. Furthermore, the sale was f. o. b. Paris, Ky. and the car would not have been delivered to plaintiff in error without payment of the freight so that its receipt and the conversion of the seed must have been done knowingly and deliberately. Plaintiff in error in its answer expressly alleges the payment by it of the freight. Even if there was a mistake it was a mistake of the agent of the plaintiff in error and could not change the legal effect of the act.

We respectfully submit that when plaintiff in error received the car and converted the seed to its own use, it in law adopted the construction of the defendant in error of the contract and made itself liable for the amount claimed by him. Undoubtedly plaintiff in error sold the seed for much more than the amount claimed by the defendant in error, and there is no reason to believe that if it had done as it had informed defendant in error it would do; namely, refuse to accept the car, defendant in error could not have sold the seed for more than the amount claimed by him to be the contract price. It seems to us that this action of plaintiff in error would in itself be sufficient to sustain the ruling of the lower court.

Furthermore, the testimony of the president and manager of plaintiff in error and its printed catalogues clearly show that the president and manager must have understood the offer to be fourteen pounds of seed for $1.40. The purchase was made and the contract was to be performed in Kentucky. "In the absence of an agreed standard the standard of the place of purchase governs." *Richardson vs. Cornforth,* 118 Fed. 325. Chas. H. Lilly, president, testified in effect, (transcript page 200) in answer to his own counsel's question, that he would understand plaintiff's Exhibit "E", being the letter of June 27 acknowledging receipt of the order, to mean that the Legislature of the State of Kentucky had fixed the weight of a trade bushel of blue grass seed at fourteen pounds. Frank Leckenby, manager, testified in effect (transcript page 166), in answer to his own counsel's question, that he understood that fourteen pounds was or had been the standard weight of a trade bushel of blue grass seed in Kentucky; and again on cross examination, (page 179 of transcript), that he understood that it had been the law in Kentucky that fourteen pounds constituted a trade bushel of blue grass seed, and that he did not know of any change in that law. C. H. Lilly also testified in effect that he had never bought blue grass seed by the bushel (transcript page 197), and afterwards Mr.

Leckenby, the manager, produced a letter written by C. H. Lilly & Co. on July 19, 1906 to C. S. Brent (Plaintiff's Exhibit "U", page 222 transcript), regarding a prospective order for blue grass seed and containing the following: " * * * * and we would much prefer your quotation to be made per 100 lbs, instead of per bu." We submit that this clearly shows knowledge on the part of the plaintiff in error of the custom for jobbers to quote blue grass seed in carload lots by the bushel. Plaintiff in error's witness, Sandahl, testified to dealings with Chas. S. Brent & Bro. of Paris, Kentucky, and other dealers in the purchase of Kentucky blue grass seed, and testified in effect that he always purchased at so much per pound and never at so much per bushel. (Transcript, page 124). Afterwards he brought into court, at our request, plaintiff's exhibit "T" (page 222 of transcript), being an invoice, showing that his purchase of such seed from Chas. S. Brent & Bro. was at a price per bushel, and that the invoice did not contain the word pound or pounds or any abbreviation or symbol therefor.

Furthermore, we respectfully submit that even should it be held that the contract between the parties was ambiguous as to the number of pounds constituting a trade bushel of blue grass seed, the lower court would have been justified in directing a verdict

in favor of the plaintiff upon the ground that the plaintiff had conclusively established by the evidence in the case a general custom throughout the United States fixing the weight of a trade bushel of blue grass seed at fourteen pounds. The testimony introduced by defendant in error by deposition and otherwise was clear and positive upon this point, and we submit that it was uncontradicted by any testimony introduced by plaintiff in error. Plaintiff in error as a wholesaler, was dealing with defendant in error as a raiser, cleaner and jobber, and all of the testimony introduced bearing upon such transactions, was clear and positive to the effect that by the general custom of the trade fourteen pounds of Kentucky blue grass seed constituted a bushel. Plaintiff in error did not offer or introduce the testimony of a single jobber. Its witnesses, including its own president and manager, were witnesses who had been accustomed to buy from either jobbers or wholesalers and to sell in small uantities. The invoice from C. S. Brent & Bro. to the witness Sandahl and the letter from C. H. Lilly & Co. to C. S. Brent & Bro. both of which have heretofore been referred to, show the custom of jobbers to quote and sell by the bushel. Both Mr. Sandahl and Mr. Lilly testified that they had not so dealt, but the written evidence showed that they were mistaken. All of the testimony given

by the witnesses for the plaintiff in error on this point was limited to the territory west of the Mississippi River and not a single witness testified to any transaction with or knowledge of the custom or course of business of any jobber in that territory. Fairly considered, the most that can be said for the testimony of the witnesses Sandahl and Burdett is that they were accustomed to buy at a price per pound from wholesalers like C. H. Lilly & Co. in lots not exceeding a few hundred pounds at the most, and to sell in much smaller quantities to their customers at a price per pound. And the most that can be fairly said for the testimony of Mr. Lilly and Mr. Leckenby is that plaintiff in error generally sold at a price per pound. This is easily to be understood. According to their testimony and their catalogues, forty-two pounds of seed would be sufficient for each acre. On this basis the carload of seed in controversy would plant 720 acres, and it is a matter of common knowledge that few, if any, farmers in the state of Washington would sow in any one year 100 acres of land to blue grass. From the catalogues and from the testimony and from an understanding of the general conditions existing in this country, it can reasonably be said that even as large a house as C. H. Lilly & Co. would make few individual sales of more than 200 pounds. Furthermore, it is apparent from the

catalogues of C. H. Lilly & Co., introduced in evidence, that a large, if not the greater part of blue grass seed purchased by it, was mixed with other seeds and sold as lawn or meadow mixtures. We have no question that in the conduct of the business of C. H. Lilly & Co. and that of Mr. Sandahl, Mr. Burdett, Mr. Schuett, and Jacob Kaufman & Co., for whom the witness, Strong, is manager, it has been and is much more convenient for their customers, buying comparatively small lots, to have their seeds quoted to them at a price per pound instead of at a price per bushel; and this is all that the testimony of the witnesses referred to amounted to.

Opposing counsel seem to place great reliance upon the case of *Richardson & Co. vs. Cornforth,* decided by the Circuit Court of Appeals, Seventh Circuit, reported in 118 Fed. 325, 55 C. C. A. 341. After a somewhat careful reading of the opinion of the court, we are unable to see what comfort counsel can obtain from that case, aside from the mere fact that the action of the lower court in directing a verdict was reversed. The correspondence was entirely telegraphic and was regarding the purchase in Chicago and shipment to Seattle of a large quantity of oats of a particular quality. We quote from the various telegrams the only reference to weight:

"Clipped oats test 36 to 37 pounds per bushel * * * "

"What weight per bushel for clipped?"

"We quoted Eddy price of White oats clipped, testing, thirty-six to thirty-seven pounds."

"Your message today Comings says basis white cleaned clipped oats 36 to 37 pounds to be bushel in bulk"

"Offer good for reply * * * one hundred sixty thousand bushels No. 2 clipped white oats 36 pounds to bushel."

"Drafts with bills of lading attached for one hundred sixty thousand bushels number two white clipped clean oats, thirty-six pounds to bushel."

It will be noted that in the first telegram from which we quote, the statement is made that clipped oats *test* 36 to 37 pounds per bushel. If the telegram had read "clipped oats test 36 to 37 pounds per bushel of 32 pounds;" there could be no room for disputing that the contract was made for white clipped oats of a quality which would test to the measured bushel 36 to 37 pounds at a price per bushel of 32 pounds. The trial court held that the contract embodied in the telegrams called for delivery on the basis of 36 pounds to the bushel, disregarding the statement we have quoted that the oats to be delivered would *test* 36 to 37 pounds to the bushel. The appellate court expressed its opinion that if unambiguous, the contract called for payment at the rate of 32 pounds to a bushel, but held (evidently in view of the facts that in the later telegrams, and especially in the telegram from the Puget Sound National Bank

which closed the transaction, the word "test" or "testing" was not used and that the oats were to be artificially treated) that the contract was ambiguous.

In every communication from defendant in error to plaintiff in error, in which reference was made to a weight of twenty-one pounds per bushel, it was stated, in effect, that the seed would test 21 pounds to the *measured* bushel, and in the letter of June 27 (plaintiff's Exhibit "E"), acknowledging receipt of the letter from plaintiff in error confirming its telegraphic acceptance, defendant in error plainly stated that a bushel meant fourteen pounds. Should it be held by this court that the contract was ambiguous, and that there was no agreed standard of weight per bushel, then the Richardson-Cornforth case is strongly in our favor. We quote from the opinion:

"The plaitiff below came into the Chicago market for his purchase. In that market, 32 pounds has been fixed by statute, as the standard for the measurement of a bushel of oats. This may not include, it is true, oats artificially treated; but it may be shown, by the custom of the market, to have been applied to clipped oats as well. The telegrams do not show that the minds of the parties came together on a different specific basis. There are repeated allusions to 'thirty-six pounds,' and to 'thirty-seven pounds' to the bushel; but upon the part of the seller, at least, this could easily, in view of the customs of the Chicago market, have been understood as reference to quality, and not to standard. An inspection of the telegrams

leaves room for the view, either that the standard agreed upon was thirty-two pounds to the bushel, or that the parties came to no specific agreement upon that element of the contract.

"In the absence of an agreed standard, the standard of the place where the commodity is purchased governs; and the evidence offered tended, at least, to show that such standard was thirty-two pounds to the bushel."

We think it reasonably clear that if it had not been for the fact that the oats in question were to be artificially treated, the appellate court would have held that the contract was specific and called for thirty-two pounds to the bushel. No such element enters into this case. The only artificial treatment to be given the seed in question was the cleaning which increased its weight per measured bushel, and thereby enhanced its quality. As we have elsewhere argued, the evidence in this case is not only clear and convincing but absolutely uncontradicted that the standard weight of a bushel of Kentucky blue grass seed in Kentucky, where it is grown and where the seed in question was purchased, was 14 pounds; and that plaintiff in error's president and its manager, who acted for it throughout the negotiations, knew that such was the standard weight. If we are right in our contention that the evidence clearly established the existence of the standard and the knowledge of it by plaintiff's officers, then *Richard-*

*son vs. Cornforth* is decisively in favor of the ruling of the lower court.

Plaintiff in error claims that the lower court had no jurisdiction of this action because the amount in controversy is less than $2,000. This contention is based upon the evidence that plaintiff in error has at various times expressed its willingness to pay defendant in error in full settlement of his demands, $2,006.67, leaving a difference between that amount and the amount claimed by plaintiff of less than $2,000. It is true plaintiff in error sent defendant in error a check for $2,006.67, and that the defendant in error refused to accept the same, and returned it. In its answer plaintiff in error claimed a tender of $2,016. in full payment of the demands of defendant in error. The check sent by plaintiff in error by defendant in error as full payment was for a less amount than the amount admitted to be due. But even if the sending of the check had amounted to a lawful tender, the tender has not been kept good. During the trial of the action, when some question regarding the claimed tender was raised, the learned district judge asked counsel for plaintiff in error if the amount admitted to be due had been paid into court, and counsel replied that it had not, but that it would be brought in and paid into the registry at the afternoon session. Apparently counsel forgot

this promise or else his client decided to remain in the position of having eaten his cake and still having it. From the time of the return of the check sent to Paris, Kentucky, defendant in error has never for one moment been in a position to take the amount admitted to be due as an ending to the whole controversy. He has had nothing but the statement of the plaintiff in error that it would be willing to pay that amount in full settlement. We, therefore, respectfully submit that the amount in controversy between the parties at the date of the commencement of this action and until final judgment, was the sum of $3,024.00 and interest thereon from the 16th day of September, 1908.

We respectfully submit that the judgment of the lower court should be affirmed.

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